Office of Chief Counsel Internal Revenue Service

memorandum

CC:LM:MCT:PHI:TL-N-2824-01

RHGannon

date:

October 10, 2001

to:

Internal Revenue Service 409 Silverside Road,

Wilmington, DE 19809

Attention: Tom Keating, Case Manager

from:

Associate Area Counsel (LMSB) - Philadelphia Richard H. Gannon, Special Litigation Assistant

subject:

FKA

(a general

partnership)

Non Significant Advice Request

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Advice has been requested as to whether, for the purpose of applying the "TEFRA rules" to the examination of transactions reflected on the return of the calendar year constitutes a "partnership" as that term is defined in I.R.C. § 6231(a)(1). For the reasons stated below, we conclude that it does not and that any adjustments affecting the taxable income of

¹ i.e., Subtitle F, Chapter 63, Subchapter C of the Internal Revenue Code of 1986, Title 26 U.S.C.

generated by transactions during are to be governed by the ordinary deficiency provisions of the Internal Revenue Code.

FACTS:

leaving behind a \$

Delaware company.4

Prior to , , a domestic general partnership, owned
and operated a global business under the "'
name ² with a number of controlled foreign distribution
subsidiaries operating throughout the world. Prior to
, was owned by (" ("),
a wholly owned subsidiary of, % by
(" "), also a wholly owned subsidiary of, and%
by (" "), a wholly owned subsidiary of
, a domestic corporation ("I ").
interests in and were unrelated except through their and putch company
interests in and and a Dutch company
conducting operations in Europe.3
Come time prior to
Some time prior to pr
and, reached agreement with (" "), a Swiss corporation regarding
the sale of the global business. From what we have been
able to learn from the four volumes of documents relating to the
sales transaction, the process of selling the business to
was accomplished in steps, starting with the sale of a number
of companies, both foreign and domestic, to entities designated
by and finishing with the withdrawal of from the state of
taking with it 's operating assets and liabilities and
operating when it is a possible and a property about the restriction and

note issued by

The partnership will be sometimes be referred to as " and sometimes as " as the factual context demands.

wholly owned, Netherlands subsidiary of was, and by by itself.

was recently formed, apparently to facilitate the sale, the note being acquired with funds furnished by and securitized with a Certificate of Participation purchased from one of the trusts formed by to monetize portions of its credit card receivables.

remained as general partners after the , and some was withdrawal of from or " " This occurred on changed to To our knowledge, there were no other or about partners of filed its Federal Partnership Return on or about .5 The only copy of the return readily available to the Service in connection with its examination of a copy of the copy retained by bearing the date .6 The return in question, consisting of over does not contain any document purporting to elect that. treated as a TEFRA partnership for examination purposes. Schedule B, Line 4 of the return states that the partnership is subject to the TEFRA rules and designates as its Tax Matters Partner. In a memorandum from , Director of Taxes to Tom Keating, the Service's Team Manager on the case, Mr. Keating states that Line 4 was "inadvertently checked" and that does not wish to be subject to the consolidated

LAW AND DISCUSSION:

calendar year."

IRC § 6231(a)(1), as effective for taxable years ending
after August 5, 1997, provides an exception to the application of

audit procedures of IRC Sec. 6221 through 6233 for the

⁶ We are advised that you have requisitioned the original return.

the TEFRA Rules for a partnership having 10 or fewer partners consisting of individuals (other than nonresident aliens), C corporations or estates of deceased partners. IRC § 6231(a)(1)(B) provides an exception to the exception for those partnerships electing to have the TEFRA Rules apply. Treas. Reg. § 301.6231(a)(1)-1T(b)(2) provides that a partnership shall elect to have the TEFRA Rules apply

by attaching a statement to the partnership return for the first taxable year for which the election is to be effective. The statement shall be identified as an election under section 6231(a)(1)(B)(ii), shall be signed by all persons who were partners of that partnership at any time during the partnership taxable year to which the return relates, and shall be filed at the time (determined with regard to any extension of time for filing) and place prescribed for filing the partnership return.

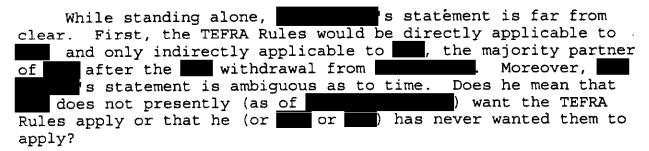
A careful scrutiny of our copy of the partnership return has failed to disclose any statement remotely approaching an election of the type prescribed by the above regulation.

IRC § 6231(g)(2), added for taxable years ending after August 5, 1997, provides as follows:

(2) Determination that subchapter does not apply. If, on the basis of a partnership return for a taxable year, the Secretary reasonably determines that this subchapter does not apply to such partnership for such year but such determination is erroneous, then the provisions of this subchapter shall not apply to such partnership (and its items) for such taxable year or to partners of such partnership.

Given the fact that our examination of the retained copy of
's partnership return for the calendar year fails to
reveal any statement electing to have the TEFRA Rules apply, any
determination that the TEFRA Rules do not apply in this case
would be, in our opinion, reasonable under IRC § 6231(g). This
conclusion is bolstered to some extent by the fact that
, tax director, has stated that
, the % general partner of, does not want the TEFRA

Rules "applied to it" for the calendar year



On the other hand, given Mr. Keating's written statement and the discussions between Mr. Keating and Service personnel (including, on August 15, 2001, the undersigned), the doctrine of equitable reformation might be applicable here. Simply stated, a court may reform a writing to conform with the actual understanding of the parties. Woods v. Commissioner, 92 T.C. 776 (1989). While we believe that Woods is slender authority for any attempt to put words into the taxpayer's mouth, we believe that meant to say that never meant the TEFRA Rules apply based on oral statements made to Service personnel on

Given the fact that there is nothing in the record to show that made the election contemplated by the regulation and that that fact, standing alone, would be sufficient to preclude the application of the TEFRA Rules in this case, we conclude that the TEFRA Rules do not apply regardless of statement.

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CONCLUSION

This concludes our advice in this matter. We are forwarding a copy of this memorandum to the Senior Litigation Counsel (HQ) (CC:LM:MTC:SLC) for mandatory ten day post review. We will promptly advise if we receive contrary advice from our national office.

RICHARD H. GANNON Special Litigation Assistant

APPROVED:

JAMES C. FEE, JR. Associate Area Counsel (LMSB)

No. 1985 April 1985 April 1985